OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable John C. Marburger
County Attorney
Fayette County
La Grange, Texas

Dear Sir:

Opinion No. O-1110
Re: Whether lessee of property abutting on a county road, having permission of owner of said abutting property and owner of the fee in the right-of-way, has a right to build an underpass under the county road and whether motor vehicles must be registered under provisions of Article 6675a-2 in order to cross under the county road by way of said underpass.

Under date of October 16, 1939, you submit for the opinion of this Department the following questions which we quote from your letter:

"A gravel company is the lessee of several tracts of land which are cut by a county public road. In mining this gravel it is necessary to cross the public road with large trucks that haul this gravel from the mine to their plant at the railroad track. The gravel company does not wish to buy licenses ~~for~~ for their trucks in order that they may thus cross the public road.

"In view of the above facts I would like to have your early opinion in the following questions:

> "'1. May the gravel Co. legally build an underpass under the public road if it is so constructed that it will not interfere with or endanger the traveling public that wishes to use this public road?
>
> "'2. If the gravel company may legally construct such an underpass will they be required to register their trucks as is required by Article 6675a-2?'"

With reference to your first question as to the right of an abutting property owner building a private underpass under a road right-of-way, you infer in your letter that the public can only have an easement in said right-of-way. We know of no rule or reason that would prevent the County or State from owning a fee simple interest in the right-of-way. We are assuming for purpose of this opinion that the public only has an easement in the road right-of-way. Nothing in this opinion shall be construed as granting permission for the construction of said underpass should the County or State have an interest in the right-of-way other than an easement.

Although the County or State may have a dominant easement in the road right-of-way, the title to the land and all profits therefrom, not inconsistent with and subject to the easement, remain in the owner of the soil. Elliott, in his work on Roads and Streets, Vol. 2, 4th Ed., 1142 says:

> "Subject only to the public easement, the proprietor has all the usual rights and remedies of the owner of a freehold. He may sink a drain below the surface of the road, if proper care be taken to cover it so that it shall remain safe and convenient. He may carry water in pipes under the way, and he may mine under it."

In Clutter v. Davis, et al, 62 S. W. 1107, the Court of Civil Appeals cited with evident approval the doctrine set out in Jackson v. Hathaway, 15 Johns (N. Y.) 447, 452; 8 Am. Dec. 263, which reads as follows:

> "When the sovereign imposes a public right-of-way upon the land of an individual

> the title of the former owner is not extinguished; but is so qualified that it can only be enjoyed, subject to that easement. The former proprietor still retains his exclusive right in all mines, quarries springs of water, timber and earth for every purpose not incompatible with the public right-of-way."

In Starr v. Camden, etc., R. R. Co., 24 N. J. Law, 597, it was held by the Supreme Court of New Jersey as follows:

> "This easement (of a public highway) does not comprehend any interest in the soil, nor give the public the legal possession of it. The right of a freehold is not touched by the establishing of a highway, but continues in the owner of the land, in the same manner that it was before the highway was established, subject to easement. This principle is so universally recognized that it would seem to be a work of supererogation to cite authorities to sustain it; hence the owner of the soil may lay water pipes, gas, or other pipes below the surface, may excavate for a vault or dig for mining purposes, and use it in any other manner that does not interrupt the free passage over it. He retains the full possession of it, subject only to the easement. He may fell the trees upon it, cut the grass, or depasture it."

In Woodring v. Forks Township, 28 Pa. 361; 70 Am. Dec. 134, Chief Justice Lewis, delivering the opinion of the Court said:

> "A man who owns soil on which the public have a highway has a right to enjoy his property in every way that may promote his interest or convenience, so that he takes care not to injure the public easement. Sic utere tuo ut alienum non laedas, is the maxim which applies in such cases. He may cut a passage across the

> road for the purpose of draining his land, or leading water to his mill, because the land is his own, and he may use it for all legitimate purposes."

In the Woodring case, supra, the Court held that the fee owner of a road right-of-way had a right to construct a mill race under the public road because the land was his to use for all legitimate purposes so long as he did not injure the public easement. For further authorities holding that the fee owner of a public highway has a legal right to build a mill race under said highway, see Dygert v. Schenck, 23 Wendell 445; 35 Am. Dec. 575 and Perley v. Chandler, 6 Mass. 453; 4 Am. Dec. 159.

In Colegrove Water Co. v. Hollywood, 151 Cal. 425; 13 L. R. A. (N. S.) 904; 90 Pac. 1055, the Court says:

> "The owner of the fee of a city street has the right to lay a water pipe for his own use beneath the surface so far as he can do so without impeding the public use, and, for that purpose, may excavate the soil, subject to such restrictions by the municipality as will insure the least interruption to the public easement."

As seen in the Colegrove case, supra, the owner of the fee in a highway may have to obstruct the road temporarily in order to lay a pipe across the road. This temporary obstruction is not such as can be prohibited as an interference with the public easement. The editor of 13 L. R. A. (N. S.) in a note to the Colegrove case, supra, at page 905, says:

> "It is a rule very generally followed by all of the cases that, where the ownership of the fee is in the abutting owner, or in anyone other than the public, the public itself has but a mere easement, and cannot prevent the use of the property under the surface by the owner of the fee. And even a mere temporary inconvenience to the public, such as a partial and temporary obstruction of the highway, by the owner of the fee, has been held not to be

> such a wrong to the public as may be prevented by injunction."

The editor of 13 L. R. A. (N. S.), supra, continues:

> "In speaking of the rights possessed by an abutting owner, which may be used to impair somewhat and for a time the rights of the public in a highway, the Court, in Clark v. Fry, 8 Ohio St. 358; 72 Am. Dec. 590, said: 'See, also, the improvement, or building, or repair of houses, and the construction of sewers, cellars and drains, on adjacent lots, often create necessary temporary impediments on public highways. These are not invasions of, but simply incident to, or rather qualifications of, the right-of-way transit; the limitation upon them is that they must not be unnecessarily and unreasonably interposed or prolonged'."

In the case of Town of Glencoe v. Reed, 101 N. W. 956; 67 L. R. A. 901, the Supreme Court of Minnesota uses the following language:

> "It is quite evident from the trend of American decisions that the only limitation upon the rights of the owner of the fee to control and use the soil and other natural deposits within the limits of the highway is that such use shall be consistent with the full enjoyment of the public easement."

Other cases holding the same doctrine might be cited, but the rule that the owner of the land upon which a public road is laid out has the exclusive use of the soil, subject to the easement of the right of travel in the public, and the incidental right of keeping the highway in proper repair for the use of the public, is so well established that the citation of other authorities is not necessary.

We conclude that the lessee of the gravel pit abutting on the county road, with the permission of the owner of

the fee in the road right-of-way, can legally build an underpass under said county road if it is so constructed that it will not interfere with or endanger the traveling public. The Commissioners' Court would have authority to supervise, in a reasonable manner, the construction of the underpass.

You inquire further as to the necessity of registering motor vehicles under the provisions of Article 6675a-2, Vernon's Annotated Statutes, in order for said vehicles to cross under a county road by way or said underpass. Article 6675a-2, supra, reads, in part, as follows:

> "Every owner of a motor vehicle, trailer or semi-trailer used or to be used upon the public highways of this State, and each chauffeur, shall apply each year to the State Highway Department through the County Tax Collector of the County in which he resides for the registration of each such vehicle owned or controlled by him. * * **"

Article 6675a-1 (m), Vernon's Annotated Statutes, defines a public highway as follows:

> "'Public Highway' shall include any road, street, way, thoroughfare or bridge in this State not privately owned or controlled for the use of vehicles over which the State has legislative jurisdiction under its police power."

It is plain that one who crosses under a county road by way of a private underpass is not using a motor vehicle "upon the public highway of this State". We conclude that motor vehicles need not be registered under provisions of Article 6675a-2, supra, in order to cross under a county road by way of said private underpass.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By Glenn R. Lewis
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Assistant

APPROVED NOV 20, 1939
Gerald C. Mann
ATTORNEY GENERAL OF TEXAS

APPROVED
OPINION
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